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No. 95-1987

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1996

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DAYTON HUDSON DEPARTMENT STORE COMPANY,
A DIVISION OF DAYTON HUDSON CORPORATION,
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent,*

INTERNATIONAL UNION, UNITED AUTOMOBILE
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA, UAW,
*Intervenors.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## INTERVENOR UAW'S BRIEF IN OPPOSITION

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## INTERVENOR UAW'S BRIEF IN OPPOSITION

### STATEMENT OF FACTS

During 1990, some of the employees of Petitioner Dayton Hudson Department Stores, working in a Hudson's store in Westland, Michigan, began an effort to select a collective bargaining representative to represent them in their dealings with the Petitioner, their employer. On May 11, 1990, the National Labor Relations Board conducted an election among a group of hourly employees at the Westland store. The employees voted 274 to 179 to select Intervenor International Union, United Automobile, Aerospace, and Agricultural Implement Workers

of America (UAW) as their bargaining representative. Since the election, Petitioner Dayton Hudson has refused to bargain with the UAW and has asserted a variety of challenges to the results of the election.

The present challenge focuses on a letter sent to the Dayton Hudson employees prior to the scheduled election. That letter, which is reproduced in its entirety at pages 109a-111a of the Appendix to the Petition, was addressed to "Fellow Hudson's Employee[s]," and discussed several of the issues that had been the subject of other pre-election communications by both the union and the employer, such as wages, health care benefits, and pension benefits. That letter also discussed the employer's claim that the union would be a "third party" and that voting for union representation would lead to the likelihood of strikes and would jeopardize the continued operations in Westland. The letter was signed by "Your Fellow Workers[,] The Westland Employees Organizing Committee."

The letter also provided a variety of information in response to the employer's claim that "better wages and benefits for us would jeopardize operations and profits." (Pet. App. 109a). One of those statements erroneously claimed that Dayton Hudson's "had claimed a profit of over 60 million dollars in our Westland Hudson's store alone." (Pet. App. 110a).

Petitioner challenged two aspects of the May 8 letter. First, Petitioner claimed that the "Dear Fellow Hudson's Employee" salutation and the "Westland Employees Organizing Committee" sign-off were misleading because the text of the letter was authored by a UAW staff member. Second, Petitioner claims that the error in the amount of profits attributed to the Westland store was deceptive.

Petitioner refused to bargain with the UAW and, when the UAW attempted to enforce the Petitioner's obligation to bargain, Petitioner asserted that these two elements of the May 8 letter so tainted the results of the election that

it should be excused from its otherwise clear obligation to bargain with the duly elected representative of its employees.

The National Labor Relations Board, in accord with the rule first developed in *Midland National Life*, 263 NLRB 127 (1982), held that it would not overturn the results of the election based on this pre-election speech. The Sixth Circuit enforced the Board's order.

## REASONS FOR DENYING THE WRIT

It is beyond dispute that, in empowering the National Labor Relations Board to conduct representation elections among employees who have expressed an interest in selecting a labor organization to represent them in their dealings with their employer, "Congress entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower*, 329 U.S. 324, 330 (1946).

Pursuant to that authority, in 1982 the Board set out in detail the rules that it would apply in determining whether pre-election speech so taints the election process that the election results will be disregarded. *Midland National Life*, 263 NLRB 127 (1982). In *Midland*, the Board concluded that, in reviewing election results, it will not "probe into the truth or falsity of the parties' campaign statements, and . . . will not set elections aside on the basis of misleading campaign statements." *Id.* at 133.[1]

The Board here applied the rule established in *Midland* to the arguments advanced by Petitioner and concluded that the election results should not be set aside based on the alleged misrepresentations in the May 8 letter.

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[1] The Board concluded that it will set aside elections, however, where "forged documents . . . render the voters unable to recognize propaganda for what it is." *Id.* This branch of the Board's analysis is not implicated here because there is no allegation that the May 8 letter was forged, or that the voters were unable to "recognize [it] for what it is."

In its Petition, Dayton Hudson does not argue that the Board misapplied the *Midland* rule. Nor does it claim that there is a conflict of Circuit authority on the question of whether the *Midland* rule is within the Board's "wide . . . discretion" in this area. Instead, Petitioner's entire argument is based on their belief that the *Midland* rule should be abandoned in favor of a different rule, one that would require the Board to set aside election results based on "misrepresentations" contained in the campaign propaganda by participants in the election process. As we show below, there is nothing about this issue that warrants this Court's attention.

1. As already noted, it is beyond dispute that the Board has "a wide degree of discretion" in developing rules governing the conduct of representation elections. Since the emergence of the *Midland* rule 14 years ago, that rule has been reviewed by no less than 8 of the 11 federal courts of appeals.[2] Each of those courts has approved the Board's *Midland* rule and not a single court of appeals has concluded that the *Midland* rule is outside the Board's discretion in this area.

Petitioner does not argue to the contrary. Instead, Petitioner observes only that a few courts have speculated that the *Midland* rule might not govern cases of truly egregious misrepresentations. (Pet. 16-17). Thus, as Petitioner notes, the First Circuit has stated that "[s]ome misrepresentations might be so material and fraudulent" that the results of the election should be overturned. *NLRB v. New Columbus Nursing Home*, 720 F.2d 726, 729 (1st Cir. 1983). The Sixth and Seventh Circuits have

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[2] In addition to the Sixth Circuit's decision in the present case, *see, NLRB v. New Columbus Nursing Home*, 720 F.2d 726 (1st Cir. 1983); *NLRB v. SEMCO Printing Center*, 721 F.2d 886 (2d Cir. 1983); *St. Margaret Memorial Hospital v. NLRB*, 991 F.2d 1146 (3d Cir. 1993); *NLRB v. Rolligon*, 702 F.2d 589 (5th Cir. 1983); *NLRB v. Chicago Marine*, 745 F.2d 493 (7th Cir. 1984); *NLRB v. Monark Boat*, 713 F.2d 355 (8th Cir. 1983); *Certainteed v. NLRB*, 714 F.2d 1042 (11th Cir. 1983).

made similar statements. (*See*, Pet. 16-17). Although these three courts have speculated that the Board's *Midland* rule *might* not extend to truly egregious misrepresentations, there is not a single court of appeals decision in which the court found misrepresentations so egregious as to warrant application of such an exception.

Thus, despite these ruminations by a few courts, no court of appeals has yet departed from the *Midland* rule. In fact, that rule has been followed in every case to address the question. And, significantly, Petitioner does not even argue that the present case belongs in the category of misrepresentations "so material and fraudulent" that they fall within any "exception" to the *Midland* rule. Instead, Petitioner correctly recognizes that it can prevail only if *Midland* itself is overturned, a result that no court of appeals has embraced.

In short, the speculation that some misrepresentations "might be so material and fraudulent" that they should fall within an exception to the *Midland* rule is just that—speculation. Not a single court has ever applied such a rule. Moreover, even if such an exception were ever to come to life, Petitioner does not even argue that the present situation would fall within it. The speculation that Petitioner spends so much energy describing therefore does not provide any reason for this Court to review the decision below.

2. Moreover, the Board's conclusion in *Midland* is undoubtedly correct. In *Midland*, the Board weighed the interests in "insuring the certainty and finality of election results, and minimizing unwarranted and dilatory claims by those opposed to the election results," 263 NLRB at 131, as well as the necessity of removing "impediments to free speech by permitting parties to speak without fear that inadvertent errors will provide the basis for endless delay and overturned elections," *id.*, against the "possibility that some voters may be misled by erroneous campaign propaganda." *Id.* at 132. The Board also noted

that, in the pre-election atmosphere in which both sides generate propaganda intended to influence the electorate, voters are "mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it." *Id.* at 130, quoting *Shopping Cart Food Market,* 228 NLRB 1311, 1313 (1977).

Petitioner has not advanced any argument sufficient to show that this determination is incorrect, let alone outside the "wide . . . discretion" granted to the Board on this question.

3. Finally, Petitioner devotes a great deal of attention to a historical review of the development of Board doctrine in this area. Prior to settling on the *Midland* rule in 1982, the Board developed a series of other rules under which election results were more likely to be overturned as a result of pre-election speech. But there is nothing about such a development which makes its end product suspicious, or which suggests that intervention by this Court at this time is necessary, some 14 years after the Board's *Midland* rule has assumed its place as the recognized standard against which pre-election speech must be judged.

As the Board itself recognized in *Midland*, "[t]he nature of administrative decision making relies heavily upon the benefits of the cumulative experience of the decision-makers." *Midland, supra,* 263 NLRB at 132. As this Court has also noted, the process of developing appropriate rules through the administrative agency process is a product of this experience and will, to a large extent, be the result of a "process of trial and error." *NLRB v. J. Weingarten,* 420 U.S. 251, 265-266 (1975). Despite Petitioner's insistence to the contrary, the fact that the Board had applied a variety of other tests before settling on the *Midland* rule 14 years ago simply provides no reason for this Court to intervene.

## CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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